



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

June 29, 2021 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African
American Data & Research Institute)
Complainant
v.
City of Hoboken
Custodian of Record

Complaint No. 2020-80

At the June 29, 2021 public meeting, the Government Records Council ("Council") considered the June 22, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian may have unlawfully denied access to the Complainant's OPRA request item Nos. 1 and 2 seeking the name, rank, and date of hire for each Hoboken Police Department employee with access to eCDR and/or ACS/ATS. N.J.S.A. 47:1A-6. Specifically, the Custodian shall confirm whether Hoboken Police Department possesses the ability to electronically extract the identities of personnel with access to the respective databases. See Paff v. Twp. of Galloway, 229 N.J. 340 (2017). If so, the Custodian shall disclose such information to the Complainant, along with the requested information under N.J.S.A. 47:1A-10, with redactions where applicable.
2. The Custodian may have unlawfully denied access to the Complainant's OPRA request item No. 3 seeking a copy of the Hoboken Police Department's ("HPD") eCDR manual, Standard Operating Procedure, or directive that existed at the time of the request. N.J.S.A. 47:1A-6. Thus, the Custodian shall either: 1) locate and disclose the responsive records to the Complainant; or 2) certify that HPD did not keep or maintain copies of the records at the time of the request.
3. **The Custodian shall comply with conclusion Nos. 1 and 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Custodian is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 29th Day of June 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 30, 2021

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 29, 2021 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of
African American Data & Research Institute)¹
Complainant**

GRC Complaint No. 2020-80

v.

**City of Hoboken (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. Record showing the name, rank, and date of hire of each employee in your Police Department who has access to eCDR. For clarification, we need to know how many members of your Police Department have access to eCDR.
2. Record showing the name, rank, and date of hire of each employee in your Police Department who has access to ATS/ACS. For clarification, we need to know how many members of your Police Department have access to ATS/ACS.
3. The Law Enforcement Manual for eCDR or Standard Operating Procedure (“SOP”) for eCDR or Directive for eCDR that is used by your Police Department.

Custodian of Record: Michael Mastropasqua
Request Received by Custodian: February 22, 2020
Response Made by Custodian: March 4, 2020
GRC Complaint Received: April 22, 2020

Background⁴

Request and Response:

On February 22, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 4, 2020, the Custodian responded in writing stating that for item Nos. 1 and 2, the Custodian stated that Hoboken Police Department (“HPD”) did not have a list of employees who have access to eCDR and/or ATS/ACS.

¹ The Complainant represents the African American Research & Data Institute.

² Represented by Alyssa Witsch, Esq., and Justin Halwagy, Esq., Assistant Corporation Counsel (Hoboken, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. City of Hoboken (Hudson), 2020-80 – Findings and Recommendations of the Executive Director

Regarding item No. 3, the Custodian stated that HPD could not produce responsive records in accordance with N.J. Court Rules, R. 1:38.

Denial of Access Complaint:

On April 22, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that since all police departments were required to file complaints using eCDR, HPD officers must have access to the system.

The Complainant also asserted that he was denied access to the name, rank, and date of hire within item Nos. 1 and 2. The Complainant argued that other police departments had no issues providing records responsive to item Nos. 1 and 2, and both items were valid requests for personnel information under N.J.S.A. 47:1A-10. The Complainant requested that the GRC compel compliance with his OPRA request and to award counsel fees.

Statement of Information:

On May 13, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on February 24, 2020. The Custodian certified that the request was sent to HPD Detective Arturo Gonzalez for review. The Custodian certified that on March 4, 2020, she responded to the Complainant stating that no responsive records exist for item Nos. 1 and 2. The Custodian also stated that HPD could not produce responsive records pursuant to R. 1:38.

The Custodian asserted that eCDR and ATS/ACS were computer systems used to submit information pertaining to criminal matters and maintained by the Judiciary. The Custodian asserted that HPD did not maintain a list of employees having access to either database. The Custodian argued that the City of Hoboken (“City”) was not required to create a record which included said information. See Matthews v. City of Atlantic City (Atlantic), GRC Complaint No. 2008-123 (February 2009); Librizzi v. Twp. of Verona Police Dep’t, GRC Complaint No. 2009-213 (August 2010).

Regarding item No. 3, the Custodian asserted that the City did not have a responsive record. Additionally, the Custodian argued that the City was not the custodian of records for the eCDR manual since the system was maintained by the Judiciary. The Custodian therefore argued that the request should have been made with the Judiciary under R. 1:38.

Additional Submissions:

On May 27, 2020, the Complainant submitted a letter in response to the Custodian’s SOI. Therein, the Complainant contended that eCDR was set up by the Attorney General pursuant to New Jersey’s bail reform law and mandated its use by all police departments in the State. The Complainant argued that HPD officers must have access to the electronic databases in order to prepare summonses and complaints against a defendant. The Complainant argued that HPD did not have to conduct any research or create any new document to comply with his OPRA request

since there would already be a record showing officers who have a username and password to access and file complaints and summonses via eCDR and ACS/ATS. Additionally, the Complainant asserted that HPD would invariably possess the personnel information of those officers having access to the aforementioned databases, and therefore could provide the requested information pursuant to N.J.S.A. 47:1A-10.

On June 15, 2020, Custodian's Counsel submitted a supplemental submission to the GRC regarding the instant matter as well as another complaint before the GRC.⁵ Counsel stated that she was bringing attention to the Appellate Division's ruling in Simmons v. Mercado, 464 N.J. Super. 77 (App. Div.), rev'd, ___ N.J. ___ (2021). Counsel asserted that the case was applicable to the instant matter in that while some HPD officers have access to eCDR and/or ATS/ACS, HPD did not have a record depicting this information. Counsel also argued that the Complainant was asking the City to create a record, which was not required under OPRA. Counsel requested that the GRC dismiss the matter in light of the decision. Later that same day, the Complainant e-mailed the GRC stating that a Notice of Petition for Certification was sent to the New Jersey Supreme Court, and that it would be premature to dismiss the matter because of the Simmons decision.

On April 21, 2021, the GRC submitted a request for additional information from the Custodian. Specifically, the GRC asked the Custodian:

1. Does the [HPD] have the ability to identify employees who have access to the eCDR and/or ATS/ACS systems electronically through the respective systems?
2. Does the [HPD] keep or maintain a copy of the eCDR manual responsive to item No. [3], either physically or electronically?

On April 22, 2021, the Custodian requested an extension to April 28, 2021, stating that Counsel had been out of the office that week. The GRC granted the extension on April 27, 2021. On April 28, 2021, Counsel e-mailed the GRC stating that because he had been away from the office, he was unable to work on providing a response and requested another extension to the following week. That same day, the GRC granted the extension with a new return date of May 5, 2021.

On May 5, 2021, Counsel e-mailed the GRC, stating that he learned that HPD possessed the ability to identify users of eCDR and ACS/ATS within its department. Counsel also stated that HPD possessed a copy of the January 2021 edition of the eCDR manual. Counsel stated that while it was not technically responsive to the Complainant's request, the City was attempting to obtain a copy for review and production. Counsel also requested another extension through May 14, 2021, to provide a certification and provide the requested records and information. On May 17, 2021, the GRC e-mailed Counsel requesting an update on the Custodian's response to the additional information request, noting that the extended deadline had expired.

On May 24, 2021, the GRC e-mailed the Custodian stating that as of that date, the GRC has not received a response to its request for additional information. The GRC then stated that the Custodian had until the end of business on May 28, 2021 to provide a response and advised that

⁵ Owoh, Esq. (O.B.O. AADARI) v. City of Hoboken (Hudson), GRC Complaint No. 2020-51.
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failure to respond may result in the GRC moving forward with adjudication without a certification. As of June 3, 2021, the Custodian has not provided a response to the GRC.

Analysis

Validity of Request

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.

[MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile, and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

In Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG, a custodian is obligated to search his or her files to find identifiable government records listed in a requestor’s OPRA request. The complainant in Donato requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

Pursuant to [MAG], the Custodian is obligated to search her files to find the identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to research her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word search is defined as "to go or look through carefully in order to find something missing or lost." The word research, on the other hand, means "a close and careful study to find new facts or information." (Footnotes omitted.)

[Id.]

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad ("any and all," requests seeking "records" generically, *etc.*) requires a custodian to conduct research. MAG, 375 N.J. Super. 534; Donato, GRC 2005-182. The second is those requests seeking information or asking questions. See *e.g.* Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See *e.g.* Naples v. N.J. Motor Vehicle Comm'n, GRC Complaint No. 2008-97 (December 2008).

Regarding requests requiring research, in Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-37 (App. Div. 2015), the court's rationale of what amounted to research supports the Council's decision in Valdes. There, the court reasoned that the plaintiff's request:

[W]ould have had to make a preliminary determination as to which travel records correlated to the governor and to his senior officials, past and present, over a span of years. The custodian would then have had to attempt to single out those which were third-party funded events. Next, he would have had to collect all documents corresponding to those events and search to ensure he had accumulated everything, including both paper and electronic correspondence. OPRA does not convert a custodian into a researcher.

[Id.] at 237. See also Carter v. N.J. Dep't of Cmty. Affairs, Div. of Local Gov't Serv., 2019 N.J. Super. Unpub. LEXIS 2510 (App. Div. Dec. 10, 2019) (affirming Carter v. N.J. Dep't of Cmty. Affairs, Div. of Local Gov't Serv., GRC Complaint No. 2016-262 (August 2018)).]

However, in Paff v. Twp. of Galloway, 229 N.J. 340 (2017), the Supreme Court of New Jersey addressed a custodian's obligation to coalesce information stored electronically into a single record. There, the Court accepted plaintiff's appeal from the Appellate Division's decision that the defendant municipality was not required to coalesce basic information into an e-mail log and disclose same. The court reached its conclusion by determining that such an action was akin to creating a record, which OPRA did not require (notwithstanding that the e-mail log would have taken a few key strokes to create). The Supreme Court reversed and remanded, holding that basic e-mail information stored electronically is a "government record" under OPRA, unless an exemption applies to that information. The Court reasoned that:

A document is nothing more than a compilation of information -- discrete facts and data. By OPRA's language, information in electronic form, even if part of a larger document, is itself a government record. Thus, electronically stored information extracted from an email is not the creation of a new record or new information; it is a government record.

. . . .

With respect to electronically stored information by a municipality or other public entity, we reject the Appellate Division's statement that "OPRA only allows requests for records, not requests for information." Paff, 444 N.J. Super. at 503, (quoting [Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005)]). That position cannot be squared with OPRA's plain language or its objectives in dealing with electronically stored information.

[Id. at 353, 356.]

The Supreme Court's ruling in Paff squares with the Council's past decisions on the issue of coalescing information from electronic systems. Specifically, in Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014), the Council addressed the custodian's argument that she was not required to create a record to satisfy an OPRA request for database information pursuant to Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated February 27, 2008). Therein, the complainant sought access to a list of adjuncts to include certain information. The custodian produced a list that did not include all information sought; however, the evidence of record indicated that she could have produced a fully responsive record. Specifically, evidence existed to support that all information the complainant sought existed within a few different databases.

Item Nos. 1 & 2

In the instant matter, the Custodian asserted that no records exist containing a list of HPD personnel having access to the eCDR and/or ATS/ACS database, and were not obligated to create a record depicting same. The Complainant asserted that HPD officers were required to submit summonses and complaints through the databases and therefore would have the ability to identify personnel with login access.

In light of the Court's decision in Paff, the GRC requested additional information from the Custodian, asking whether HPD had the ability to identify personnel with access to eCDR and/or ACS/ATS through the respective systems. However, despite granting several extensions of time, the Custodian failed to provide a certification in response to the GRC's request. Nonetheless, in a May 5, 2021 e-mail, Counsel stated that HPD did have the ability to identify personnel having access to eCDR and ATS/ACS. Still, because the response was not made via certification, the record remains unclear as to whether HPD could provide responsive records to item Nos. 1 and 2.

Accordingly, the Custodian may have unlawfully denied access to the Complainant's OPRA request item Nos. 1 and 2 seeking the name, rank, and date of hire for each HPD employee

with access to eCDR and/or ACS/ATS. N.J.S.A. 47:1A-6. Specifically, the Custodian shall confirm whether HPD possesses the ability to electronically extract the identities of personnel with access to the respective databases. See Paff, 229 N.J. at 353. If so, the Custodian shall disclose such information to the Complainant, along with the requested information under N.J.S.A. 47:1A-10, with redactions where applicable.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA also provides that the GRC “shall not have jurisdiction over the Judicial or Legislative Branches of State Government or any agency, officer, or employee of those branches. N.J.S.A. 47:1A-7(g). However, in Pitts v. N.J. Dep’t of Corr., GRC Complaint No. 2013-299 (September 2014), the custodian argued in part that because the requested presentence report was a court record created by the Judiciary, it was not a government record under N.J.S.A. 47:1A-1.1, and not within the GRC’s jurisdiction under N.J.S.A. 47:1A-7(g). The Council disagreed, holding that because the agency received and kept on file a copy of the record, it still met the definition of a government record. N.J.S.A. 47:1A-1.1.

Item No. 3

In the instant matter, the Custodian responded to the Complainant stating that requested record could not be provided in accordance with R. 1:38. In the SOI, the Custodian certified that HPD did not have responsive records, and added that because eCDR was a system maintained by the Judiciary, HPD was not the records custodian for the requested record. The Custodian asserted that a request for the record should be made with the Judiciary via R. 1:38.

In reviewing the Custodian’s responses, the record was unclear as to whether HPD in fact possessed responsive records. In accordance with Pitts, if HPD possessed a manual, SOP, or directive regarding eCDR, the record may be subject to access notwithstanding whether the record pertains to a system under the Judiciary’s control. Thus, the GRC requested additional information from the Custodian, asked the Custodian to certify whether HPD kept or maintained a manual for eCDR, either physically or electronically.

However, as noted above, the Custodian failed to provide a certification in response to the GRC’s request. In the May 5, 2021 correspondence Counsel stating that HPD did possess a copy of the January 2021 version of the eCDR manual. However, Counsel did not indicate whether HPD possessed a version that existed at the time of the request. Thus, the record is unclear as to whether HPD possessed responsive records at the time of the Complainant’s request.

Accordingly, the Custodian may have unlawfully denied access to the Complainant’s OPRA request item No. 3 seeking a copy of the HPD’s eCDR manual, SOP, or directive that

existed at the time of the request. N.J.S.A. 47:1A-6. Thus, the Custodian shall either: 1) locate and disclose the responsive records to the Complainant; or 2) certify that HPD did not keep or maintain copies of the records at the time of the request.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Custodian is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian may have unlawfully denied access to the Complainant's OPRA request item Nos. 1 and 2 seeking the name, rank, and date of hire for each Hoboken Police Department employee with access to eCDR and/or ACS/ATS. N.J.S.A. 47:1A-6. Specifically, the Custodian shall confirm whether Hoboken Police Department possesses the ability to electronically extract the identities of personnel with access to the respective databases. See Paff v. Twp. of Galloway, 229 N.J. 340 (2017). If so, the Custodian shall disclose such information to the Complainant, along with the requested information under N.J.S.A. 47:1A-10, with redactions where applicable.
2. The Custodian may have unlawfully denied access to the Complainant's OPRA request item No. 3 seeking a copy of the Hoboken Police Department's ("HPD") eCDR manual, Standard Operating Procedure, or directive that existed at the time of the request. N.J.S.A. 47:1A-6. Thus, the Custodian shall either: 1) locate and disclose the responsive records to the Complainant; or 2) certify that HPD did not keep or maintain copies of the records at the time of the request.
3. **The Custodian shall comply with conclusion Nos. 1 and 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁶**

⁶ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁷ to the Executive Director.⁸

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Custodian is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

June 22, 2021

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. City of Hoboken (Hudson), 2020-80 – Findings and Recommendations of the Executive Director